

DRUGGED DRIVING CONFERENCE

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Cross-Examination of Defense “Experts”

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Cross-Examination of Defense “Experts”

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Supplemental Materials and Links

NHTSA Guide on Cross Examination for Prosecutors:

https://ndaa.org/wp-content/uploads/Cross-Exam_for_Prosecutors_Mongraph.pdf

NDAA Resources – Publications and Videos - scroll down to Traffic Law section

<https://ndaa.org/resources/publications-videos/>

Video Links:

Legally Blonde Cross Examination:

https://www.youtube.com/watch?v=GSu7BGbyJqc&feature=emb_logo

The Staircase cross examination clip:

https://www.youtube.com/watch?time_continue=2&v=XmheZj5n-c&feature=emb_logo

Casey Anthony cross:

https://www.youtube.com/watch?time_continue=15&v=CTw1B5NIJV4&feature=emb_logo

Second Blood Tube Video:

https://www.youtube.com/watch?time_continue=117&v=cIYU1dh7DQA&feature=emb_logo

News Clip of Texas Expert:

https://www.youtube.com/watch?v=5rqww3Id6dM&feature=emb_logo

Cross-Examination of Defense Experts

Lauren Ramirez, Assistant Mesa City Prosecutor

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How a good cross makes you feel:



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Why do Cross Examination?

Goals of Cross Examination

- Obtain factual admissions helpful to the State's case;
- Corroborate the testimony of the State's witnesses;
- Minimize the defense case by impeachment of the witness on the stand; and
- Minimize the defense case by impeachment of other defense witnesses through the witness on the stand



NHTSA Cross Examination for Prosecutors

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Successful Cross Examination Starts Early - Defense Disclosure



- Make Defense follow the rule and give you something written about what the "expert" is going to testify about.
- Caution: the Rule works both ways!


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Successful Cross Examination Starts Early - Defense Disclosure

- Ariz. R. Crim. Pro. 15.2(c)(2)
- At the same time the defendant files a notice of defense, the defendant must provide the following information for each expert the defendant intends to call at trial:
 - (A) the expert's name, address, and qualifications;
 - (B) any report prepared by the expert and the results of any completed physical examination, scientific test, experiments, or comparison conducted by the expert; and
 - (C) if the expert will testify at trial without preparing a written report, a summary of the general subject matter and opinions on which the expert is expected to testify



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Successful Cross Examination Starts Early - Work Product Objections

- ▶ Ariz. R. Crim. Pro 15.4(b)(1) - Work Product Exception
- ▶ State ex. rel. Corbin v. Ybarra, 161 Ariz. 188 (1989) - Consulting Experts

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Successful Cross Examination Starts Early - Research the Topic

- ▶ What type of DUI case is it? Is it a marijuana case? Alcohol case? Rx drugs?
- ▶ Google
- ▶ APAAC Website - Training Materials
- ▶ Your Criminalist/Forensic Scientist
- ▶ Experienced DRE/DRE Instructor
- ▶ TSRP and other experienced prosecutors in the area
- ▶ NDAA - Resources - "Traffic Law"
- ▶ RAJIs
- ▶ Hospital Libraries
- ▶ Local Colleges



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Successful Cross Examination Starts Early - Research the Expert

- ▶ Google - LinkedIn and other social media sites
- ▶ TSRP - transcripts, cross examination outlines/questions
- ▶ Criminalist/Forensic Scientists

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Pretrial Preparation - Pretrial Interview of the Expert



- ▶ Consider taking your information and doing an interview of the Expert Witness
- ▶ BEWARE - this may cost money so check before you do it.
- ▶ This is the only setting where asking an open ended or a bad question can't hurt you - no jury!
- ▶ But do consider your approach - friendly? Aggressive?

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Pretrial Preparation - Putting it All Together

- ▶ Take the research you've gathered and determine what approach you want to take with the Expert
 - ▶ Attack credibility?
 - ▶ Bolster the State's case/evidence?
- ▶ Make an outline of points for cross for your witness
- ▶ Consider creating an outline of points to hit with each witness you intend to cross examine and what points you might want to save for last.



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Pretrial Preparation - Considerations Specific to Experts

- ▶ Do not try to outsmart an expert in their field.
- ▶ Beware that these are professional experts who get paid a significant amount of money for their testimony. They will look for any opportunity to answer a question of yours by explaining what they want to explain or expounding on some point they want to make.
- ▶ Keeping control of cross with an expert presents its own difficulties. Plan for ways to shut down their unwanted science lessons.



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For example...



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Game Time Considerations - Obtaining Factual Admissions



- ▶ Sign Post
 - ▶ You weren't out there on September 16, 2020 with Defendant on the side of the road right?
 - ▶ And never spoke to him that night or examined him as he was that night?
 - ▶ In fact, you never examined him did you?
 - ▶ You became involved several weeks or even months after this incident right?
 - ▶ You were paid to be here, correct?
 - ▶ What were you asked to do?
 - ▶ Your job to help the jury understand the science? Lets talk about that more...

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Game Time Considerations - Corroborate the Testimony of the State's Witnesses

- ▶ Use the Expert to corroborate what your expert already said
- ▶ The experts will usually agree with the science - it's supported by a lot of research!
- ▶ You can use that to bolster your case.
- ▶ You agree marijuana is an impairing drug, correct?
- ▶ You don't dispute that people get high from marijuana?
- ▶ And it has the ability to impair a person's ability to drive, right?
- ▶ Impairs judgment?
- ▶ Impairs motor coordination?
- ▶ Impairs reaction time?
- ▶ Makes divided attention tasks more difficult?
- ▶ Affects the body differently than alcohol, but affects the body nonetheless?
- ▶ No universal level of impairment for MJ right?
- ▶ You agree studies have shown impairment at even relatively low levels, right?

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For Example...



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For Example...



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Game Time Considerations - How You Ask the Question



- ▶ Be careful of open-ended questions
 - ▶ Those questions that begin with who, what, why, how
 - ▶ This gives the witness an opportunity to explain - we want to avoid this with experts
- ▶ Use leading questions
 - ▶ You would agree with me right that _____
 - ▶ And _____, correct?
 - ▶ You don't dispute that _____

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Game Time Consideration - Impeaching Other Defense Witnesses



- ▶ They will usually agree that alcohol/drugs affects the human body in a variety of ways
- ▶ Pilot Study - People are poor predictors of their own impairment

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Game Time Considerations - Impeaching the Expert with Prior Statement

- ▶ Review transcripts of prior testimony if available and familiarize yourself with what the witness has said previously
- ▶ Read the transcript thoroughly, highlight the part you want to use
- ▶ Bring extra copies
- ▶ Don't give them an opportunity to explain it

- ▶ "Did you testify at a DUI trial in the City of Tempe, on September 7, 2019?"
- ▶ "You testified for the defendant in that case, is that correct?"
- ▶ "You were sworn to tell the truth prior to testifying, right?"
- ▶ "You are aware those proceedings were recorded?"
- ▶ "The attorneys asked you questions and you answered them, is that right?"
- ▶ "I'm showing you what's been marked as State's Exhibit 5 for purposes of identification and the cover indicates that it is a portion of a transcript of your testimony in the case of Saig v. John Doe in the City of Tempe Municipal Court on September 7, 2019, correct?"
- ▶ "On page 15, line 6 you were asked a question and responded as follows: (Read the applicable question and answer slowly and clearly.)
- ▶ "Did I read that correctly?"

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Game Time Considerations - Attacking the Expert's Credibility

- ▶ Address trumped up qualifications
- ▶ Address State friendly experience
- ▶ Address experience in different chemical tests

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For Example...



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Game Time Considerations - Controlling the Rogue Witness

- ▶ The "Crossing Guard"
- ▶ Specific Control Questions
 - ▶ Sir, do you need me to ask the question again?
 - ▶ Sir, did you not understand the question I asked?
 - ▶ Sir that was not my question. Please listen carefully. My question is.....
- ▶ Object - Non-Responsive



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Develops Over Time and with Practice

- ▶ Watch and observe others
- ▶ Add in different techniques as you become comfortable with them
- ▶ Push yourself, but do what you feel comfortable with, because if you're uncomfortable the jury will be able to tell
- ▶ BE YOU!

-Feel-
FREE
TO BE
YOURSELF

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Contact Info



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